IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JAIPUR BENCH

JUDGMENT

Dharmendra Kumar Vishnoi Vs. State of Rajasthan
(S.B. CRIMINAL APPEAL NO.1072/2002)

S. B. Criminal Appeal under Sec.374 (2) Cr.P.C. against the judgment dated 13-8-2002 in Sessions Case No.21/2001 passed by Sh. R.P.Audichya, RHJS, Special Judge (NDPS Cases) Jaipur.

Date of Judgment: January 04, 2007.

PRESENT

HON'BLE MR. JUSTICE SHIV KUMAR SHARMA

Mr. V. P. Bishnoi, for the appellant.

Mr. M.L.Goyal, Public Prosecutor for the State.

BY THE COURT:

Challenge in this appeal is to the judgment dated August 13, 2002 of Learned Special Judge (NDPS Cases) Jaipur, whereby appellant Dharmendra Kumar Vishnoi was convicted and sentenced under section 8/18 Narcotic Drugs and Psychotropic Substances Act,1985 (for short `NDPS Act') to undergo 10 years rigorous imprisonment and fine of Rs.1 lac, in default to further suffer 2 years rigorous imprisonment.

2. Background facts of the case are as under:-

On July 12, 2001 Sunil Kumar Punia, SHO Mahesh Nagar Jaipur having received secret information about trafficking of narcotic substance, rushed to the place pointed out by the informant and apprehended the appellant. Subsequently on suspicion that the appellant was in possession of

contraband the SHO informed him to conduct the search either in presence of Maruti Joshi, Circle Officer (Pw.16), who was a Gazetted Officer and happened to be present there or in the presence of Magistrate. The appellant consented for his search to be conducted in presence of Maruti Joshi. On being searched 6.100 gm opium was recovered from the possession of appellant in presence of motbirs, out of which two samples of 35 gm. each were taken and sealed and remaining opium was also sealed. The appellant was accordingly arrested, a case was registered and investigation commenced. During investigation statements of witnesses were recorded by the police and the samples were sent to FSL. On chemical examination, the samples contained in each of the packet marked `A' and `B' gave positive tests for the presence of chief constitutents of coagulated juice of opium poppy having 2.47% morphine and 2.18% morphine respectively vide Ex.P-18. After completion of all formalities of investigation charge sheet was filed. In due course the case came up for trial before the learned Special Judge (NDPS Cases) Jaipur. Charge under section 8/18 NDPS Act was framed against the appellant, who denied the charge and claimed trial. The prosecution in support of its case examined as many as 16 witnesses and got exhibited 26 documents. In the explanation under Sec.313 CrPC, the appellant claimed innocence. No witness in defence was however examined. Learned trial Judge on hearing final submissions convicted and sentenced the appellant as indicated herein above.

3. I have pondered over the rival submissions and scanned the material on record.

4. Since the only submission advanced before me relates to the

interpretation of Section 50 NDPS Act, I deem it appropriate to have a close look at Section 50, which reads as under:-

> "S.50 Condition under which search of person shall be conducted
> (1) When any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.
> (2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).
> (3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.
> (4) No female shall be searched by any one excepting a female.
> (5) When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973 (2 of 1974).
> (6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy two hours send a copy thereof to his immediate official superior."

5. Evidently section 50 has been introduced with the obvious intent to avoid any harm to innocent persons and to avoid raising of allegation of planting or fabrication by prosecuting authorities. It mandates

that if a person to be searched so requires, the officer who is about to search him under the provisions of section 41 and 42 shall take such person without any unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate. The Gazetted Officer or the Magistrate before whom any such person is brought, shall, if he sees no reasonable ground for search, forthwith discharge the person. Requirement of section 50 are as under:-

> "(i) It is mandatory for the officer conducting search and seizure to inform the suspect his right to be searched in presence of the Magistrate or Gazetted Officer.
> (ii) It is mandatory for the officer conducting search and seizure to follow the mandate of sub-section (3) and to inform the suspect that Gazetted Officer or the Magistrate, if sees no reasonable ground for search, shall discharge the person."

6. Coming to the facts of the instant case I notice that vide notice Ex.P-11 the appellant was informed by Maruti Joshi, Circle Officer, Mansarovar, thus:-

> "आपको जरिये नोटिस मैं CO व्रत मानसरोवर जयपुर शहर राजपत्रित अधिकारी सूचित करती हूं कि मुझे आपके पास मादक पदार्थ अफीम होने की विश्वसनीय सूचना मिली है आप यहां पर अफीम बेच रहे हैं तथा आपके पास अब भी अफीम हो सकती है इसलिए आपकी तलाशी ली जाती है आप इस काम के लिए स्वतंत्र है कि आप अपनी तलाशी किसी मजिस्ट्रेट साहब या मन CO या किसी अन्य राजपत्रित अधिकारी के समक्ष चलकर मुझे दे सकते हैं। इस समय हमारे पास को मजिस्ट्रेट उपस्थित नहीं हैं। मैं CO मानसरोवर स्वयं एक राजपत्रित अधिकारी हूं इसलिए आप चाहे तो अपनी तलाशी मुझे दे सकते हैं। अतः अपना जवाब दें।"

Obviously the requirement of section 50 NDPS Act have not been strictly followed. The appellant was not informed that the Magistrate or Gazetted Officer, if he sees no reasonable ground for search shall discharge the appellant.

7. Constitution Bench of the Apex Court in State of Punjab Vs. Baldev Singh (1999)6 SCC 172, indicated that to be searched before a gazetted officer or a Magistrate, if the suspect so requires, is an extremely valuable right which the legislature has given to the person concerned having regard to the grave consequences that may entail the possession of illicit articles under the NDPS Act. It appears to have been incorporated in the Act keeping in view the severity of the punishment. The rational behind the provision is even otherwise manifest. The search before a gazetted officer or a Magistrate would impart much more authenticity and creditworthiness to the search and seizure proceedings. The Apex Court indicated as under:-

(Para 26)

> "The safeguard or protection to be searched in the presence of a gazetted officer or a Magistrate has been incorporated in Section 50 to ensure that persons are only searched with a good cause and also with a view to maintain the veracity of evidence derived from such search. We have already noticed that severe punishments have been provided under the Act for mere possession of illicit drugs and narcotic substances. Personal search, more particularly for offences under the NDPS Act, are critical means of obtaining evidence of possession and it is, therefore, necessary that the safeguard provided in Section 50 of the Act are observed scrupulously. The duty to inform the suspect of his right to be searched in the presence of a gazetted officer or a Magistrate is a necessary sequence for enabling the person concerned to exercise that right under section 50 because after Maneka Gandhi v. Union of India (1978)1 SCC 248, it is no longer permissible to contend that the right to personal liberty can be curtailed even temporarily, by a procedure which is not "reasonable, fair and just" and when a statute itself provides for a "just" procedure, it must be honoured. Conducting a search under section 50,

> without intimating to the suspect that he has a right to be searched before a gazetted officer or a Magistrate, would be violative of the "reasonable, fair and just procedure" and the safeguard contained in Section 50 would be rendered illusory, otiose and meaningless. Procedure based on systematic and unconscionable violation of law by the officials responsible for the enforcement of law, cannot be considered to be a "fair", just or reasonable procedure. We are not persuaded to agree that reading into Section 50, the existence of a duty on the part of the empowered officer, to intimate to the suspect, about the existence of his right to be searched in the presence of a gazetted officer or a Magistrate, if he so requires, would place any premium on ignorance of the law. The argument loses sight of a clear distinction between ignorance of the law and ignorance of the right to a "reasonable, fair and just procedure".

It is thus evident that the safeguard or protection to be searched in the presence of a gazetted officer or a Magistrate has been incorporated in section 50 to ensure that persons are only searched with a good cause and also with a view to maintain the veracity of evidence derived from such search. The duty to inform the suspect of his right to be searched in the presence of a gazetted officer or a Magistrate is a necessary sequence for enabling the person concerned to exercise that right.

8. A close look at sub-section 3 of Section 50 demonstrates that the gazetted officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made. The Legislature, by enacting sub-section (3) and by providing power to a gazetted officer to discharge a person, in my opinion, never thought of a gazetted police officer. As per the mandate of sub-section (3) the gazetted officer should be an independent person, unconcerned with the success or failure of the case. The

interpretation of sub-section (1) ignoring the mandate of sub-section (3), in my view, is incomplete.

9. Prior to incorporation of sub-section 5 in section 50, the authorised officer himself could not search the suspect, but with effect from October 2, 2001 the authorised officer in an emergant situation may effect the search and seizure subject to the checks provided in sub-section 6. These amended provisions are not applicable to the search and seizure effected on July 12, 2001 in the instant case. As already noticed Maruti Joshi, CO informed the appellant that since Magistrate was not available, she being a gazetted police officer could search the appellant. Such was not the situation in State of Rajasthan Vs. Ram Chandra (2005 AIR SCW 2133).

10. Their Lordships of the Supreme Court in State of Punjab Vs. Balbir Singh (1994)3 SCC 299, indicated that section 50 of NDPS Act confers a valuable right on the person to be searched in the presence of gazetted officer or Magistrate if he so requires, since such a search would impart much more authentic and creditworthiness to the proceedings while equally providing an important safeguard to the accused and that, therefore, the safeguard conferred under section 50 is to be taken as an important requirement and as a legislative imperative and non compliance would vitiate the trial.

11. In the case on hand the appellant was not permitted to freely exercise his option. Even the appellant was not informed that Gazetted Officer or the Magistrate had power to discharge the appellant, in the absence of reasonable ground for search. Since the appellant was not fully

made aware of his right and the officer himself played the role of Gazetted Officer as well as the Magistrate, the appellant could not have been convicted. The appellant had a right to choose between gazetted officer and a Magistrate and if he was not completely informed of his right he could not be expected to exercise his option freely. Since the mandatory provisions of section 50 of NDPS Act have been flouted, the appellant is entitled to benefit of doubt.

12. For these reasons, I allow the appeal and set aside the impugned judgment dated August 13, 2002 of Special Judge, NDPS Cases Jaipur. I acquit the appellant of the charge under section 8/18 NDPS Act. The appellant Dharmendra Kumar Vishnoi, who is in jail, shall be set at liberty forthwith, if not required to be detained in any other case.

(Shiv Kumar Sharma)J.

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